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amendment of 1911<sup>2</sup> was the result of the agitation aroused by a reversal for a defect in an indictment. The folly of such reversals has been generally agreed upon by judges and lawyers. If the constitutional amendment can not be applied to defects in indictments when cured by the evidence, the exact situation which gave rise to its adoption,<sup>3</sup> and if cases are still to be reversed on the mechanical precedents existing before the amendment, one may well feel that judicial perversity in the application of technicalities is incurable by the ordinary methods of legislation or constitutional amendment.

A. M. K.

FRAUD: EXECUTORY CONTRACT OF SALE: RIGHT OF VENDEE TO AFFIRM CONTRACT AND SUE ON THE FRAUD.—Where A, by fraud, induces B to enter into a contract to purchase land from him to be paid for in installments, and B pays one installment, enters, and then discovers the fraud, what are his rights? It is to be observed that the injury here consists not in breach of contract, nor of warranty. The fraud is strictly collateral to the contract; and the only right of action at law to which it can give rise is an action on the case in deceit, sounding not in contract but in tort. Law, however, as well as equity, recognizes the further principle that such fraud may render the contract voidable at the election of the injured party. His possible courses of action may be catalogued as follows:

(1) He may offer to rescind the contract, and tender back the land. He is then entitled, (a) to recover the installment paid, (b) to recover special damages, such as, for example, money expended for improvements, and (c) to secure a decree in equity annulling the contract, and other relief where appropriate.

(2) He may affirm the contract, keep the land, and sue his vendor for damages in an action on the case in deceit for the fraud. Prerequisite to his recovery, he must either show full performance or tender full performance to date, but need make no tender of amounts not yet due.<sup>1</sup> It is submitted that this is

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<sup>2</sup> Cal. Const. art. vi, § 4½: "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

<sup>3</sup> *People v. Carroll* (1905), 1 Cal. App. 2, 81 Pac. 680. Incidentally it may be noted that in the principal case the name of the crime was correctly stated in the indictment, which was not the case in *People v. Carroll*, a circumstance relied upon by the court in its decision in that case.

<sup>1</sup> *Hines v. Brode* (Oct. 3, 1914), 48 Cal. Dec. 333, 143 Pac. 729, affirming with modifications, *Hines v. Brode* (June 12, 1914), 18 Cal. App. Dec. 117. Comment on latter in 2 Cal. Law Rev. 333.

entirely logical and just. The rule of damages applied is that he may recover a sum equal to the value of the land had the fraudulent representations been true, less (a) the value of the land as it actually is, and (b) the unpaid balance of the contract price. In addition he is entitled to special damages.<sup>2</sup> His affirmation of the contract is no waiver of past damages.<sup>3</sup>

The rule of damages above stated is a source of difficulty. A concrete example under it certainly challenges question. In *Hines v. Brode*, cited above, the defendant, who had by means of fraud concerning water rights persuaded the plaintiff to agree to buy his land for \$2000, and collected about \$300 thereof, now, after discovery by the plaintiff of the fraud, finds himself bound, not only to lose the land, but also to pay the vendee \$4000 in addition.

Carry the case one step further, and assume that the plaintiff had paid one dollar, or nothing at all down, and had merely entered; he would, according to the rule, be still entitled to keep the land, and recover an amount equal to the value of the land as represented, less the sum of the actual value and the price unpaid. If the represented value was \$4000, the actual value \$400 and the contract price \$300, a portion of which has been paid down, we have the curious result that (1) the less paid down (actual damage) the more the vendee recovers, and (2) his largest possible recovery will occur where he has parted with not a single cent. It is evident that this rule of damages is not consonant with the old familiar rule that a plaintiff must aver actual damage before he states a cause of action in deceit.

It is, however, established beyond argument in California as in most jurisdictions that a rule of damages based upon the value of the land were it as represented, is the proper one for an action in deceit. It is submitted that therefore the rule of the principal case is under the circumstances as logical as any that can be devised.

Some jurisdictions in this country base their rule of damages not on the represented value, but on the pecuniary loss actually incurred by the vendee. In such jurisdictions there is no logical objection to granting the vendee his damages for losses up to the moment of discovering the fraud. It is a curious fact, however, that every case found which recognizes in its decision such a right,<sup>4</sup> was decided in a jurisdiction following the California rule of damages.

O. F. M.

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<sup>2</sup> *Hines v. Brode*, *supra*.

<sup>3</sup> *Hines v. Brode*, *supra*. *Contra*, 2 Cal. Law Rev. 333; *Ponder v. Alta Farms Co.* (Colo., Oct. 5, 1914), 143 Pac. 570.

<sup>4</sup> See cases cited in *Hines v. Brode*, and comment thereon, 2 Cal. Law Rev. 333.